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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 818.

THE TIMKEN ROLLER BEARING COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF THE TIMKEN ROLLER BEARING COMPANY.

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A careful examination of the brief for the National Labor Relations Board in opposition to the petition of The Timken Roller Bearing Company for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case will make it apparent that the contentions of the Board do not adequately address themselves to the questions which have been presented by the petition.

The first question raised by this petition is, who is to interpret the provisions of a collective bargaining agreement relating to the employer's obligation to furnish information regarding wage rates to the Union and providing for the processing of grievances through various stages including arbitration? Stated otherwise, may the Board intervene by placing its own interpretation on the collec-

tive bargaining agreement and find a failure on the part of the employer to bargain in good faith under the National Labor Relations Act and enter an order requiring an employer to furnish information to the Union outside the channels set up in the contract?

In its brief filed in this Court (p. 10) the Board said that:

> "The threshold question is thus whether the Board and the Court of Appeals correctly interpreted both the contract and also the nature of the Union's claim in this case."

We submit that this is the fundamental error in the whole approach of the Board to this case. It has always been our contention that the Board should not have undertaken to interpret the contract since the parties had vested that function in an arbitrator to be appointed as provided in the contract.

While the Board recognizes that its own incorrect statement of the question "is important" (page 10 of the brief for the National Labor Relations Board), it seeks to avoid the basic and important issue in this case by three somewhat different but inter-related line of argument.

First the Board argues that the Union's demand for information in this case "could not be fully presented or resolved under the grievance and arbitration provisions of the contract" between the parties in this case. It says that this "threshold question" turns "on the terms of a particular agreement and on an evaluation of particular conduct," and for that reason does not warrant review by this Court.

The fallacy in this argument is two-fold. First of all, it is not the function of the Board or the Court of Appeals to interpret a collective bargaining agreement with respect

to the substantive rights and obligations of the parties thereunder, where the contract itself provides that disputes arising under its terms shall be resolved through the grievance and arbitration procedure. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593. These cases are distinguished on page 12 of the Board's brief by the assertion that courts should not intervene where disputes were on their face subject to the grievance procedure. We submit that this is an incorrect interpretation of this Court's statements. In *Warrior and Gulf Navigation Company*, this Court said:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad."

The Board in its brief (pages 12 and 13) has quoted out of context a statement made by this Court in *Atkinson vs. Sinclair Refining Co.*, 370 U. S., 238, 241. The Court of Appeals also relied on that case. That was a case which involved an action in the district court for damages under Section 301 of the Labor Management Relations Act. The question involved there was whether Count 1 stated a cause of action under Section 301. Obviously it was necessary to examine the contract in order to determine whether or not a cause of action was stated. There is nothing analogous between that case and the present case. We do not have a Section 301 case and there was no occasion—in fact no authority—for either the Board or the Court to interpret the contract.

The parties reposed the authority to make decisions in arbitrators. Certainly the Union thought all the grievances referred to in the Board's complaint could be decided by arbitrators appointed under the applicable contracts. Assuredly the Company has been willing to have the matters so resolved.

Second, both the Board and the Court of Appeals in applying their brand of interpretation adopted a view of the wage data clause and of the grievance and arbitration provisions of the contract between the parties which gave these a very narrow scope. In fact, in the footnote on page 7 of its brief filed in this Court, the interpretative process is continued for there it is said that the wage information clause merely calls for the periodic production of final rates when changed. The interpretative approach affects not merely the contract between the parties in this case but would be applicable to any other case in which the meaning of a contract is in issue and the Board elects to circumvent the arbitration procedure of a collective bargaining agreement by commencing an unfair labor practice case. For that reason, the effect of the decision of the Board and of the Court of Appeals cannot be limited to the facts of this particular case, as the Board attempts to do.

The decision in this respect is also in conflict with the principle involved in a decision of this Court in *Drake Bakeries, Inc. v. Bakery & Confectionery Workers*, 370 U. S. 254. In that case, the Court held that an employer's claim for damages, resulting from the Union's violation of a no-strike clause, must be resolved through the arbitration provisions of the contract, and that a suit for damages in the Federal Court should be stayed pending arbitration of the claim. The Court gave a very broad effect to the arbitration clause of the contract, and stated:

"* * * The dispute which this record presents appears to us to be one particularly suited for arbitration, if the parties have agreed to arbitrate. We hold that they did so agree and will hold the company to its bargain."

The second line of argument used by the Board in its brief is an attempt to gloss over the following important considerations: (1) the fact that the demand for data which was under consideration by the Board in this case was directly related to the several grievances which were even then pending in the arbitration stage, (2) the further fact that the Union's demands for wage data were submitted to and considered by the arbitrator in three of those cases which were heard and decided prior to the Board's decision and order, and (3) the Union's rights to data were adjudicated by the arbitrator in each of those cases. The main thrust of the Board's complaint centered around six grievances that had been appealed to arbitration. Ancillary to this center of the complaint was a reference to a general demand phrased in paragraph 10 of the complaint, Pet. App. page 4a. Neither the Board nor the Court dealt differently with the two phases of the complaint. The Board also claims that in any event the arbitration procedures "would not provide the Union with the more generalized information sought." But this argument overlooks the fact that the Union's demand for information in connection with the specific grievances was itself very broad and could not have been satisfied without furnishing the more general materials described in paragraph 10 of the complaint (Pet. App. p. 4a) if they were essential to the arbitration process.

Disregarding for the moment the question resulting from the full discussion of this matter in the contract negotiations, it is perfectly clear, we submit, no case can be made out for a refusal to bargain on this ground unless we

are to understand that any time the Union makes a demand on an employer while a contract is in effect in respect of a matter covered by the contract, the employer must comply with the demand at the risk of having a Board action if he refuses. There was not the slightest support for the Union's position of need in the record beyond the bare language of the demand contained in its letter of July 18, 1960, Pet. App. p. 119a. It couldn't have needed this information in respect of existing rates for they were frozen (Article V, Section A, 1960 Agreement, Physical Exhibit attached to Pet. App.). If it was needed in respect of new rates the arbitration process was available. One of the errors contained in the brief filed in this Court is the argument that no data was supplied by the Company even in respect of individual grievances until an arbitrator made an order. (Page 7, Board's brief in opposition.) The Company went to some length to show that in cases where the Union had asked for data in earlier steps of the grievance procedure, it had been supplied. (Appendix 4, pp. 134a-163a.) It happens that the Union did not request data in any of the cases referred to in the Board's complaint during any of the earlier steps of the grievance procedure. In the VanKirk case, a demand was made about one week before the arbitration proceedings were scheduled to commence. (Stip. Ex. 1013, pp. 96a-97a P. A.) Thus a correct statement would be (1) if the Union asked for data in a Section C case in the early steps of the grievance procedure, it was provided, (2) if no demand was made before arbitration, it was provided at that time because it was only by use of this material that the Company could prove how a new rate was developed, (3) in the Section B case, the Company contended that wage data was not relevant, a position that was upheld by an arbitrator in the Hose case. (Stip. Ex. 2D,

p. 73a P. A.) Thus no basis for a refusal to bargain was shown in respect of the so-called generalized material.

Third, the Board in its brief disregards the fact that in most of the pending grievances, with respect to which data was requested by the Union, the issue raised by the grievance was not concerned with the *method* of calculating new rates or as to the accuracy or sufficiency of the data used in doing so (a case under Section C of Article V of the contract), but rather challenged the right of the Company under the collective bargaining agreement to make *any* change whatever in those particular rates (a case under Section B of Article V of the contract). For example, one of the grievances referred to the provisions of the contract which set forth the circumstances under which the Company could change existing wage rates during the term of the agreement, and asserted:

> "None of the circumstances that are outlined in Article V of the 1956 Agreement have taken place; However the Company has seen fit to establish a new rate. I feel that this is a violation of Article V of the 1956 Agreement * * *." (Grievance of Herman V. Schuler, Pet. App. 75a-76a.)

Similarly, in another of the grievances, it was asserted:

> "We have had an established rate of $3.20 each for drilling and tapping four tapered holes. There has been no change in this job. Therefore, the Company has no right to change the rate * * *." (Grievance of H. Smallwood et al., Pet. App. 75a.)

Under these circumstances, the Company asserted that the data used in establishing the new rates were not relevant to this primary issue. Until the question of the Company's right to make *any* change in rates was resolved, the question of the Union's rights to the data used in establishing

the rates did not arise. Thus, the present case involves precisely the same situation as the *Hercules* and *Sinclair* cases referred to on pages 18 and 19 of the petition for a writ of certiorari. The Board in its brief fails to recognize the true nature of the grievances, describing them as merely complaints that the new rates were "improperly established" (footnote 4 in Board's brief, page 5). Two *Sinclair* cases were referred to in the Company's petition for a writ of certiorari one a decision by the Fifth Circuit (306 Fed. 2d 561) and second a recent decision by the Board (145 NLRB No. 68). The Board in its brief undertakes to distinguish the latter case by saying that in that case the arbitration hearings had been completed before the Board got around to making a decision (footnote 11, page 14). We submit that this is a rather poor distinction in view of the fact that three of the arbitration cases had been similarly disposed of in this case and the balance would have been had the Union been willing to proceed.

The Board defines the question raised by the petition in this case as being "whether a contract grievance-and-arbitration provision under which claims for information may be determined provides the exclusive means for obtaining such information." In fact, that is not an accurate description of the question. Even though the contract contains adequate provision for resolving the problem, if an employer declines to utilize that procedure, or does not affirmatively propose the use of that procedure to resolve the problem, the resort to the Board for relief may be justified. But when a charge of refusal to bargain in good faith is made against an employer, its expressed willingness (as in this case) to have the issue of the Union's right to wage data resolved through the arbitration procedure established by the contract becomes an important and significant factor. This is particularly true where the

type and amount of data to be furnished by the employer to the Union has been the subject of extensive contract negotiations, and where the contract between the parties does contain a provision relating to the employer's obligation to furnish such data. It is this factor which the Board and the Court of Appeals have failed to consider in this case.

Thus, this petition raises fundamental questions concerning the nature and scope of an employer's collective bargaining duties under the National Labor Relations Act and the effect of an existing agreement between the employer and the Union on that bargaining duty with regard to a matter covered by the contract.

There are three significant observations that can properly be made concerning the material in the Board's brief on the subject of waiver. First, no effort was made to supply any interpretation of the phrase "clear and unequivocal." As petitioner said in its original petition for a writ of certiorari, if the evidence in this case does not meet that standard, it is impossible to conceive such a case.

Not suprisingly, no effort is made to explain how the Board can intervene by requiring petitioner, in effect, to modify its agreement in the face of the language contained in Section 8(d) of the National Labor Relations Act, 29 U. S. Code, Section 158(d). Surely it is the policy of the law that the parties can make as good or as bad an agreement as they want to but once it is made and it deals with a particular subject matter, whether it is on a broad or on a restricted basis, the Board must be required to recognize the agreement during its term, otherwise the objective of the law to have binding contracts signed is never going to be met.

Finally, in footnote 12 on page 14 of its brief, the Board relies upon *National Labor Relations Board vs.*

Perkins Machinery Company, No. 6182, decided on January 23, 1964, by the Court of Appeals for the First Circuit. That case merely cites the decision of the Court of Appeals in this case as authority for the requirement of clear and unequivocal evidence. Factually, however, that case bears no resemblance to this case. In the opening paragraph of the Court's opinion, the Court said that the question was whether the employer had violated Section 8(a)(5) and (1) of the Act by refusing to furnish the Union certain wage information and data allegedly relevant to a grievance and/or arbitration proceeding. The mere recital of those facts serves to differentiate that case from the case at bar.

Thus, the waiver question in this case comes down to a question of whether a Union's right to information from an employer is in a special category, so that the parties cannot define their respective rights and obligations by their agreement. No decisions by this Court or any other Court have established any such principle.

For these reasons, we submit that the petition in the present case presents questions of fundamental importance to clarify the rights and obligations of employers and unions in the collective bargaining process and in the utilization of procedures for resolving disputes arising under collective bargaining agreements. The Board's decision, affirmed by the Court of Appeals in this case, imposes collective bargaining duties beyond those previously recognized, and apparently in conflict with the provisions of the National Labor Relations Act itself. It also drastically limits the scope of the grievance and arbitration provisions in collective bargaining agreements.

To consider these important questions, we again urge that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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